RECORD
AND
BRIEFS

No. 13-339

In The
Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF JERRY ENSMINGER, THE ESTATE OF CHRISTOPHER TOWNSEND, MIKE PARTAIN, KRIS THOMAS, AND THE ESTATE OF ROSANNE WARREN AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether 42 U.S.C. § 9658 preempts periods of repose such as that found in N.C. Gen. Stat. § 1-52.

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INTEREST OF *AMICI CURIAE*[1]

Jerry Ensminger, the Estate of Christopher Townsend, Mike Partain, Kris Thomas, and the Estate of Rosanne Warren submit this brief as *amici curiae* in support of respondents. *Amici* lived on or near Marine Corps Base Camp Lejeune in Jacksonville, North Carolina, at various points between the 1950s and 1985. During this period, drinking water provided through Camp Lejeune's Tarawa Terrace and Hadnot Point water systems was highly contaminated with multiple human carcinogens. The toxic exposure had devastating consequences for these *amici*, and for many other Marines and their families.

Jerry Ensminger joined the United States Marines after graduating from high school in 1970. Ensminger and his wife were assigned to Camp Lejeune in 1973. In 1975, while the couple was living in the base's Tarawa Terrace neighborhood, Ensminger's wife became pregnant with their second child. The family moved away from Camp Lejeune in December 1975, and their daughter Janey was born in South Carolina on July 30, 1975. In 1982, the Ensmingers returned to Camp Lejeune. Although the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in its entirety and that no party or counsel for any party, nor any other person or entity other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. Respondents have provided *amici* with written consent to the filing of this brief, and petitioner has consented to the filing of this brief by a blanket agreement filed with the clerk of this Court.

family lived off-base, Janey frequently visited the base, often spending time at the base swimming pools. Janey was thus exposed to Camp Lejeune's carcinogenic water both *in utero* and as a young child. In the summer of 1983, Janey fell ill and was ultimately diagnosed with acute lymphocytic leukemia. After a grueling course of chemotherapy, Janey died on September 24, 1985, at age nine. Jerry Ensminger had no reason to suspect that Camp Lejeune's water could have contributed to his daughter's death until 1997, when he saw a news report about possible contamination on base. When he contacted the Marine Corps and the Navy, officials assured him that the contamination was minor and could not have been responsible for Janey's illness and death. Not satisfied by these assurances, he began his own investigation and uncovered years of evidence suppression and deceit by the military regarding the contamination at Camp Lejeune.

Tom Townsend joined the Marines in 1949 at age 18. He and his wife Ann had a healthy son in 1955 and a healthy daughter in 1962. Assigned to Camp Lejeune in 1965, they were living in a neighborhood served by the base's Hadnot Point water system when their third child was conceived. Christopher Townsend was born on March 16, 1967, in the Camp Lejeune naval hospital. The baby struggled immediately after birth, and was diagnosed with serious heart defects. Over the following weeks, Christopher was treated in the Camp Lejeune naval hospital, and twice admitted into the naval hospital in Bethesda,

Maryland. On June 27, 1967, Christopher Townsend died after living just three and a half months. An autopsy revealed that he died of congenital malformation of the heart. Tom Townsend only realized that his wife and infant son may have been exposed to toxic water at Camp Lejeune in 1998, after reading an article in a magazine. He would eventually work with Jerry Ensminger to uncover countless documents demonstrating the extent of the contamination and the scope of the government's efforts to suppress the evidence. Townsend currently has a claim under the Federal Tort Claims Act ("FTCA") pending before the Department of the Navy on behalf of his son's estate.

Mike Partain is the grandson and son of Marine officers whose combined service includes World War II, the Korean War, and the Vietnam War. Conceived in 1967 and born in 1968 at Camp Lejeune, Partain was exposed to the base's carcinogenic drinking water *in utero* and as an infant. Partain lived a seemingly normal life until April 2007, when, on his eighteenth wedding anniversary, he was diagnosed with male breast cancer. He underwent a right mastectomy and eight rounds of active chemotherapy, followed by a year of oral chemotherapy. Male breast cancer is exceptionally rare and its occurrence peaks in men aged 71 years. Partain developed the disease at age 39, has no family history of breast cancer, and lacks the genetic mutation common in most male breast cancer victims. Partain was unaware of his exposure to carcinogenic chemicals in Camp Lejeune's water until

two months after his diagnosis, when his father viewed a CNN report featuring Jerry Ensminger's congressional testimony about Camp Lejeune's contamination. Partain volunteered as an advocate for those poisoned at Camp Lejeune, and has identified an ever-expanding cluster of male breast cancer victims who were similarly exposed to Camp Lejeune's toxic drinking water. Partain currently has a claim under the FTCA pending with the Department of the Navy.

Kris Thomas is the son of a United States Marine. Born in 1958, Thomas lived in Camp Lejeune's Tarawa Terrace from approximately 1965 to 1970, just a few streets down from Mike Partain. Thomas's father was stationed at Camp Lejeune. In 1970, the Thomas family moved off base, but he regularly visited the base. Thomas enjoyed swimming and frequented Camp Lejeune's pools, waterways, and ponds. Thomas also attended school on base and received medical treatment at the base hospital. As an adult, Thomas served as a Church of God minister until 2004, when he was diagnosed with male breast cancer. He had surgery to remove the carcinoma and affected lymph nodes, and then underwent several months of chemotherapy. His treatment required him to resign from the ministry. Thomas only realized that he and his family had been exposed to carcinogens at Camp Lejeune when his wife read an article about Mike Partain's advocacy in a local newspaper in October 2007. Thomas currently has a claim

under the FTCA pending before the Department of the Navy.

Rosanne Warren was born in 1971. Her mother, Patricia Warren, had worked on Camp Lejeune's Hadnot Point throughout her pregnancy. Through the early 1980s, Rosanne would frequently visit and stay with family friends in Tarawa Terrace while her mother was working. When she was twelve years old, Rosanne began suffering from serious kidney problems, which required multiple stent implants. Despite her medical problems, Rosanne attended college, and went on to receive a degree in medical technology. In her mid-20's, Rosanne was diagnosed with cervical cancer. She underwent chemotherapy, radiation, and surgical removal of her uterus. Despite aggressive treatment, the cancer returned in her hip and kidney. Rosanne died in 2000, at age 28. Her mother Patricia did not learn that she and her daughter had been exposed to carcinogens at Camp Lejeune until 2008, when a friend told her about a community meeting discussing the issue. Patricia Warren is currently pursuing an FTCA claim on behalf of her daughter's estate before the Department of the Navy.

Amici's interest in this case is substantial because its resolution could impact their claims against the government, as well as those of other victims of the Camp Lejeune contamination. Many of these victims are pursuing FTCA claims before the Navy. Some are pursuing FTCA claims in federal court. Those claims have been consolidated and are on appeal before the Eleventh Circuit. *See Bryant v. United*

States; Camp Lejeune Water Contamination Litigation v. United States, No. 12-15424 (11th Cir., argued Jan. 17, 2014). In the Eleventh Circuit, the United States contends that North Carolina's statute of repose shields the government from all liability for injuries to the Camp Lejeune victims. Its argument in the Eleventh Circuit as to CERCLA preemption is nearly identical to the one it now makes to this Court as *amicus curiae*. *See* Brief of the United States, *Camp Lejeune Water Contamination Litigation*, No. 12-15424 (11th Cir. filed Feb. 11, 2013).

Amici also have a strong interest in ensuring that individuals with a long-latency cancer due to toxic contamination can pursue recovery in states with similar periods of repose. *Amici* have experienced cancer's devastating impact on individuals, families, and communities. If state statutes are permitted to bar victims of long-latency cancers from pursuing claims against those who caused their suffering, many victims will have no effective legal recourse, regardless of how clearly they were wronged.

Finally, *amici* know firsthand the extent to which perpetrators will attempt to hide their wrongs from victims. The Navy has required that Camp Lejeune test its water systems annually since 1963, but no records exist of any such tests until 1980. Although Camp Lejeune officials received reports of the water contamination as early as 1980, they did not begin closing wells on base until November 1984. For over two decades, the United States failed to notify potential victims of their exposure to contaminated

water, suppressed information regarding the extent of the contamination, and refused to provide medical support. It took an act of Congress in 2007 for the military to begin formally notifying all exposed personnel and their families. Had Camp Lejeune officials notified these individuals more promptly, the suffering of countless victims could have been reduced through preventive care, aggressive monitoring, and early treatment.

SUMMARY OF THE ARGUMENT

Camp Lejeune's water supply was contaminated with dangerous carcinogens for decades. Although the military had reason to know of the contamination, it did nothing to address the problem. Once the government finally began closing contaminated wells, it concealed the scope of the contamination for many years. *Amici* and countless others have had their lives devastated because of exposure to Camp Lejeune's contaminated water. Because cancer often develops many years after an individual is exposed to carcinogens, most of these victims did not know of their injuries until many years after they left Camp Lejeune. Those who developed injuries more immediately did not know that Camp Lejeune's water could have been the cause until the government's deception was exposed.

In 1986, Congress enacted legislation ensuring that individuals who develop long-latency diseases

because of exposure to hazardous waste would have the opportunity to bring suit, regardless of state limitation periods. This legislation was intended to address claims such as those arising from Camp Lejeune's water contamination. Petitioner and the United States as *amicus*, however, argue that the federal law has no effect on North Carolina's statute of repose. Their interpretation contravenes both the text and the intent of the 1986 legislation. If adopted, it would prevent the victims of Camp Lejeune from having any legal recourse, and would reward entities that conceal their misconduct. *Amici* and others similarly situated should not be excluded from the law's protection.

ARGUMENT

1. EXTENSIVE WATER CONTAMINATION AT CAMP LEJEUNE LASTED FOR DECADES, WAS CONCEALED BY THE GOVERNMENT, AND AFFECTED THOUSANDS OF MARINES AND CIVILIANS.

A. The government exposed Marines and their families to toxic water for decades.

Founded in 1941, Camp Lejeune is the largest Marine Corps base on the East Coast. On approximately 220 square miles adjacent to Jacksonville, North Carolina, the base typically serves more than 100,000 service members, military families, and

civilian personnel. *Amici* and their families once lived on or near this base.

The government maintained a cavalier attitude toward waste disposal at Camp Lejeune for much of the mid-twentieth century. Although the base had a hazardous waste dump since 1959, military officials permitted the disposal of waste at other locations throughout the base. Mike Magner, *A Trust Betrayed: The Untold Story of Camp Lejeune and the Poisoning of Generations of Marines and Their Families* 33-34, 55-59 (Da Capo Press 2014).[2] Waste was generally either dumped onto the land or into ditches dug by Marines. *Id.* at 33-34. These wastes included industrial cleaning solvents, gasoline, oil, mustard gas, battery acid, heavy metals, and pesticides. *Id.* at 55-59, 87-90. In addition, as much as one million gallons of fuel from the base's fuel depot leaked into the soil, forming large pools of diesel and gasoline floating on top of the aquifer closest to the surface. *Id.* at 87, 209-11.

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[2] Many of the original source documents upon which Magner relies were uncovered through the tireless efforts of advocates for Camp Lejeune's victims. In 2007, the Agency for Toxic Substances and Disease Registry released many of these documents along with a water modeling study of Tarawa Terrace. Advocates for Camp Lejeune victims have compiled a more comprehensive account of the events discussed in this brief with accompanying citations to these original sources. That account can be accessed at http://tfltptf.com/Misc/Timeline_Linked_March_2012.pdf.

Camp Lejeune is supplied by on-base water wells. Since at least 1963, the Navy recognized that it was "responsible for the protection and the purity of the water during its distribution on its premises." Dep't of Navy, Manual of Naval Preventative Medicine ("NAVMED"), P-5010 § 5-23 (August 1963), *available at* http://www.tftptf.com/New_ATSDR1/NAVMED_P-5010-5_1963.pdf. It likewise recognized that "ground waters are becoming polluted with increasing frequency and the resulting hazards require special surveillance," particularly from "chemical pollutants originating either from sewage or industrial effluents." *Id.* § 5-32, Appendix A. Accordingly, the Navy required that a "complete chemical analysis of the water supply shall be made annually[,]" with the additional requirement that "[i]f the supply is from wells, water from each well is analyzed." *Id.* § 5-32(5)(a). Despite these requirements, there is no indication that Camp Lejeune's water systems or wells were tested in the years before 1980.

In 1974, Camp Lejeune officials acknowledged that they understood the risk posed by industrial pollutants. That year, the Camp Lejeune Base Commander issued an order recognizing that "organic solvents were hazardous materials," and that "improper disposal practices create hazards such as the contamination of drinking water." U.S. Marine Corps, Camp Lejeune Base Order 5100.13B (June 27, 1974), *available at* http://tftptf.com/CLW_Docs/CLW5996.pdf. Knowing the source of the base's drinking water and the extent and nature of the waste disposed at the

base, military officials had many reasons to suspect that the water system was already contaminated. *See* Magner, *supra*, at 55-59.

Officials would eventually have definitive proof. In the wake of impending federal water quality regulations, base officials had water samples independently evaluated in 1980 and 1981. *Id.* at 45-47. These evaluations repeatedly revealed that Camp Lejeune's drinking water was highly contaminated, and generated numerous written warnings to military officials. *Id.* The first report from October 1980 stated: "heavy organic interference . . . you need to analyze for chlorinated organics." *Id.* at 46. Another from 1981 flatly stated: "water highly contaminated with other chlorinated hydrocarbons (Solvents)!" *Id.* at 46. Despite these warnings, the military made no effort to shut down wells, improve water quality, or notify Marines and their families of the dangerous contaminants in their drinking water.

In 1982, tests revealed that the base's water was contaminated with the cleaning solvents Trichloroethylene ("TCE") and Perchloroethylene ("PCE"). *Id.* at 51-52. A sample from the Hadnot Point system contained 1,400 parts per billion ("ppb") of TCE. *Id.* at 53. At the time, the Navy's Bureau of Medicine and Surgery ("BUMED") Instructions limited the concentration of chlorinated hydrocarbons such as TCE and PCE in drinking water to maximums ranging from 3 to 100 ppb. *See* Dep't of Navy, BUMED Instruction 6240.3C at 6 (Dec. 13, 1972), *available at* http://tftptf.com/CLW_Docs/CLW0144.pdf. Although water test

results were reported up the chain of command, the military made no effort to further investigate or address the problem. Magner, *supra*, at 51-53.

It was not until late 1984 that military officials took any action. In November and December of that year, three wells were closed after tests revealed TCE concentrations ranging from 300 to 1,600 ppb, along with elevated levels of benzene and other industrial contaminants. *Id.* at 69-70. Approximately one month after these wells were taken out of service, an on-base elementary school water fountain was found to contain 1,100 ppb of TCE. *Id.* at 71. Additional tests then revealed TCE contamination levels in some wells as high as 18,900 ppb. *Id.* Camp Lejeune finally closed its contaminated wells in 1985. *Id.*

The Agency for Toxic Substances and Disease Registry ("ATSDR") has conducted multi-year studies on Camp Lejeune's water contamination. *See* Morris L. Maslia, et al., *Analyses and Historical Reconstruction of Groundwater Flow, Contaminant Fate and Transport, and Distribution of Drinking Water Within the Service Areas of the Hadnot Point and Holcomb Boulevard Water Treatment Plants and Vicinities, U.S. Marine Corps Base Camp Lejeune, North Carolina* (March 2013) ("ATSDR Hadnot and Holcomb Report"), *available at* http://www.atsdr.cdc.gov/sites/lejeune/hadnotpoint.html; Morris L. Maslia, et al., *Analyses of Groundwater Flow, Contaminant Fate and Transport, and Distribution of Drinking Water at Tarawa Terrace and Vicinity, U.S. Marine Corps Base Camp Lejeune, North Carolina: Historical Reconstruction*

and Present-Day Conditions (March 2009) ("ATSDR Tarawa Terrace Report"), *available at* http://www.atsdr.cdc.gov/sites/lejeune/tarawaterrace.html. These studies performed historical reconstruction calculations to estimate the monthly levels of contaminants in the drinking water provided to on-base family housing units. ATSDR Tarawa Terrace Report, *supra*, at A2; ATSDR Hadnot and Holcomb Report, *supra*, at A2.

The ATSDR's studies demonstrate that Camp Lejeune's Tarawa Terrace and Hadnot Point water systems were highly contaminated with multiple known human carcinogens from the 1950s to 1985. ATSDR Tarawa Terrace Report, *supra*, at A70; ATSDR Hadnot and Holcomb Report, *supra*, at A100-01. Because Camp Lejeune's water systems had different degrees of contamination, individuals living on base during the contaminated period experienced varying levels of exposure.

B. The government concealed the nature and scope of Camp Lejeune's contamination.

After exposing its Marines, civilian personnel, and their families to poisonous water for decades, the government compounded its malfeasance by making every effort to prevent these victims, including *amici*, from learning that they had been exposed to dangerous carcinogens.

After they closed contaminated wells in 1984 and 1985, military officials downplayed the extent of the contamination through euphemistic language that

obscured the problem and deceived the victims. For example, around the time the wells were shut down, Camp Lejeune's waste disposal practices had begun attracting media attention. Although the base's drinking water had been highly contaminated for years, base officials represented to the media that "people had not been directly exposed to the pollutants[,]" and characterized the closure of wells as "precautionary measures." Jerry Allegood, *Civilians, military investigating waste dumps at Camp Lejeune*, Raleigh News & Observer, Sept. 15, 1985, at 29A. In requesting residents of the Tarawa Terrace neighborhood to reduce their water usage, Camp Lejeune's base commander indicated that two wells had been shut down "because of minute (trace) amounts of several organic compounds." Magner, *supra*, at 73. The notice stated that "[t]here are no definitive State or Federal regulations regarding a safe level of these compounds, but as a precaution, I have ordered the closure of these wells for all but emergency situations[.]" *Id.* Contrary to these assertions, Camp Lejeune's water had previously contained as much as 300 times the TCE levels then permitted by the Navy. *See* BUMED Inst. 6240.3C at 6.

The military would continue its deceptive conduct for many years to come. It resisted turning over files to the ATSDR, Magner, *supra*, at 100; fought a proposed ATSDR study of infants born at Camp Lejeune, *id.* at 104; and refused to fund surveys to locate children born on the base, *id.* at 107. It misled the Environmental Protection Agency ("EPA") as to

when water tests had been conducted and what those tests revealed. William R. Levesque, *Camp Lejeune water contamination history detailed in documents*, Tampa Bay Times, October 16, 2009, *available at* http://www.tampabay.com/news/military/veterans/camp-lejeune-water-contamination-history-detailed-in-documents. In 2010, a news reporter revealed that the Navy and Marine Corps had simply failed to turn over many relevant documents to the ATSDR, including one estimating that over one million gallons of fuel had leaked into the ground from the Hadnot Point fuel farm. Magner, *supra*, at 211. Military officials went so far as to advocate delaying the mailing of health questionnaires to ensure that they did not coincide with the release of the movie *A Civil Action*, which addressed the relationship between TCE contamination and childhood leukemia in Woburn, Massachusetts. *Id.* at 110. Indeed, military officials' resistance was so egregious that the EPA investigated whether their deceptive conduct warranted criminal charges for obstruction of justice. *Id.* at 167-68.

Even after being publicly reprimanded by members of Congress, the military refused to notify all affected Marines until forced to do so by the John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 318(b), 120 Stat. 2083 (2006). This law also required the Navy to fund comprehensive studies evaluating the impact of pre-natal, childhood, and adult exposure to Camp Lejuene's contaminated water. *Id.* § 318(a).

C. Camp Lejeune's toxic water devastated countless lives.

The chemicals found in Camp Lejeune's water included TCE, PCE, benzene, and vinyl chloride ("VC"). *See* Frank J. Bove, et al., *Evaluation of mortality among marines and navy personnel exposed to contaminated drinking water at USMC base Camp Lejeune: a retrospective cohort study*, Environmental Health 2014 13:10 ("Marine Cohort Study"), *available at* http://www.ehjournal.net/content/13/1/10. These chemicals can be absorbed into the body through ingestion, skin exposure, and inhalation. *Id.* at 2. For example, an individual taking a ten-minute shower can absorb as much TCE through inhalation as he or she would by drinking two liters of the same water. *Id.* By the time Camp Lejeune began shutting down contaminated wells, its drinking water contained levels of these volatile organic compounds that were hundreds of times greater than what is considered safe for humans. As many as one million people could have been exposed to Camp Lejeune's contaminated water.

TCE, benzene, and VC are known human carcinogens; PCE is considered a "likely" human carcinogen. ATSDR Hadnot and Holcomb Report, *supra*, at A16. Exposure to these chemicals is associated with a wide variety of cancers and diseases, including leukemia, breast cancer, bladder cancer, kidney cancer, cervical cancer, liver cancer, non-Hodgkin's lymphoma, and multiple myeloma. *See* ATSDR, *Reported health effects linked with trichloroethylene (TCE), tetrachloroethylene (PCE), benzene, and vinyl chloride*

(VC) exposure, *available at* http://www.atsdr.cdc.gov/sites/lejeune/tce_pce.html (last visited March 27, 2014) (collecting scientific studies). *In utero* exposure to TCE and PCE is associated with childhood leukemia, major heart defects, neural tube defects, and fetal death. *Id.*

Individuals exposed to Camp Lejeune's contaminated water have significantly elevated rates of cancer mortality. A recent study compared the mortality rates of all Marines posted at Camp Lejeune between 1975 and 1985 to that of Marines posted at California's Camp Pendleton during the same period. *See* Marine Cohort Study, *supra*. The study found that Camp Lejeune Marines were more likely to die from several causes, including "kidney cancer, liver cancer, esophageal cancer, cervical cancer, multiple myeloma, Hodgkin lymphoma, and [Amyotrophic Lateral Sclerosis]." *Id.* at 13. Marines with high cumulative exposures to Camp Lejeune's contaminants had substantially higher cancer mortality rates. For example, Camp Lejeune Marines with high exposure to contaminated water were 580% more likely to die of cervical cancer than Camp Pendleton Marines, while Camp Lejeune Marines with low to no exposure to contaminated water were 112% more likely to die of cervical cancer than Camp Pendleton Marines. *Id.* at 9.

Children born to women exposed to the contaminated water during their pregnancy also experienced higher rates of juvenile diseases and disorders. A 2013 epidemiological study evaluated whether *in*

utero and infant exposures to the base's contaminated water were associated with a defined set of birth defects and childhood cancers. Perri Z. Ruckart, et al., *Evaluation of exposure to contaminated drinking water and specific birth defects and childhood cancers at Marine Corps Base Camp Lejeune, North Carolina*, Environmental Health 2013, 12:104, *available at* http://www.ehjournal.net/content/12/1/104. The study found that children exposed to contaminated water *in utero* were more likely to be born with neural tube disorders such as spina bifida and anencephaly, and were more likely to develop childhood hematopoietic cancers such as childhood leukemia and childhood non-Hodgkin's lymphoma. *Id.* at 1-2.

Many cancers caused by exposure to VC, TCE, PCE, and benzene do not manifest until decades after exposure to the chemical. "The time between first exposure to a cancer-causing agent and clinical recognition of the disease is called the latency period. Latency periods vary by cancer type, but for some cancers may be 15 to 20 years or longer." Centers for Disease Control and Prevention, Workplace Safety and Health Topics, *Cancer Clusters*, *available at* http://www.cdc.gov/niosh/topics/cancer/clusters.html (last visited March 27, 2014). In a Congressional hearing on Camp Lejeune, Dr. Michael L. Gros, a Navy obstetrician, testified that after exposure to the toxins found in Camp Lejeune's water, "[t]he cancerous effects do not appear until 10 to 15 years[.]" *Poisoned Patriots: Contaminated Drinking Water at Camp Lejeune: Hearing before the H. Comm. on Energy and Commerce*, 110th

Cong. 12, 15 (June 12, 2007) (statement of Michael L. Gros, M.D.).

In 2012, recognizing the weight of the scientific evidence, Congress enacted the Janey Ensminger Act, Pub. L. No. 112-154, 126 Stat. 1165 (Aug. 6, 2012). Under the Act, if a veteran or veteran's family member was exposed to Camp Lejeune's contaminated water for more than thirty days and later develops one of a number of listed diseases, there is a rebuttable presumption that the disease was caused by the individual's exposure. 38 U.S.C. § 1710(F). The Act establishes a presumption of causation for fifteen illnesses or conditions: breast cancer, kidney cancer, multiple myeloma, renal toxicity, female infertility, scleroderma, non-Hodgkin's lymphoma, lung cancer, bladder cancer, leukemia, myelodysplastic syndromes, hepatic steatosis, miscarriage, and neurobehavioral effects. *Id.*

While helping many of Camp Lejeune's victims, the Act provides only limited relief. Because victims are only "eligible for hospital care and medical services," *id.*, the Act provides no benefit to Tom Townsend, whose infant son died years before the Act's passage. It likewise provides limited benefit to individuals such as Kris Thomas, who was treated for his breast cancer several years before the Act's passage, but who has been unable to return to his career as a minister due to the side effects of treatment. Because the Act covers only veterans and their family members, individuals such as Rosanne Warren, who was not a family member of a veteran who served on

active duty at Camp Lejeune, would not benefit from the Act in any way.

II. CERCLA'S UNIFORM DISCOVERY RULE WAS INTENDED TO ADDRESS SITUATIONS EXACTLY LIKE THOSE EXPERIENCED BY THE VICTIMS OF CAMP LEJEUNE'S CONTAMINATED WATER.

A. As amended, CERCLA was intended to protect the rights of those suffering from long-latency diseases.

In 1980, Congress enacted CERCLA "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009). CERCLA established a twelve-person study group "to determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment[.]" 42 U.S.C. § 9651(e).

The study group published its report in July 1982. *See* Superfund Section 301(E) Study Group, 97th Cong., Injuries and Damages From Hazardous Wastes – Analysis and Improvement of Legal Remedies (Comm. Print 1982) ("Study Group Report"). The report recognized that "[t]he most common mode of human exposure to waste chemicals is through groundwater." Study Group Report at 13. It likewise recognized:

> Exposure to certain hazardous wastes may result in cancer, neurological damage, and in mutagenic and teratogenic changes. Most of these types of injuries have long latency periods, sometimes 20 years or longer. With long latency periods, a rule which starts the running of the statute from the time of exposure will defeat most actions before the plaintiff knows of his injury.

Id. at 28. The report therefore recommended:

> that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitation in barring plaintiff 's claim before he knows that he has one.

Id. at 241.

Rather than wait for action from the states, Congress amended CERCLA in 1986 to "address[ ] the problem identified in the 301(e) study." H.R. Conf. Rep. No. 99-962 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. Congress's solution established a minimum "federally required commencement date" ("FRCD") that applies to state causes of action for "personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment

from a facility[.]" 42 U.S.C. § 9658(a). The FRCD applies "[i]f the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the [FRCD]." *Id.* The FRCD is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned." *Id.* § 9658(b)(4).

The FRCD is a simple and effective solution to the problems identified by the Study Group Report. It permits certain claims to be brought when an individual has discovered both an injury and its cause, regardless of whether the period for filing suit has passed under state law.

B. Petitioner's position would terminate with prejudice the claims of individuals, such as the Camp Lejeune victims, who suffer from long-latency diseases.

If not for the FRCD, claims arising from the Camp Lejeune contamination would accrue pursuant to the same North Carolina statute that would otherwise bar respondents' claims in this case. That statute provides:

> [F]or personal injury or physical damage to claimant's property, the cause of action . . . shall not accrue until bodily harm to the

> claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.

N.C. Gen. Stat. § 1-52(16). Petitioner mistakenly argues that this provision is not subject to the FRCD.

If the FRCD does not override N.C. Gen. Stat. § 1-52(16), the North Carolina statute could bar all claims from individuals suffering from diseases with latency periods longer than ten years. But the Study Group Report's detailed discussion of the problem posed by long-latency injuries never mentioned a latency period less than ten years – indeed, it frequently addressed latency periods as long as thirty and forty years. *See, e.g.*, Study Group Report at 55 ("ten-to-forty year latency period"); *id.* at 240 (Given "the delayed impact on different organs or the central nervous system, the latency period for the appearance of injury or disease is likely to be extended for thirty years or more[.]"); *id.* at 242 ("carcinogenic, mutagenic, and teratogenic effect may not manifest themselves until 20 or 30 years later"). Petitioner essentially argues that although Congress enacted the FRCD to address the problem, it intended to exclude entirely from its solution the handful of states that provided limitation periods similar to North Carolina's. This argument is as incoherent as it is inhumane.

The FRCD was enacted to ensure that the courthouse doors would be open to individuals like the victims of the Camp Lejeune contamination. Mike Partain was exposed to Camp Lejeune's water *in utero* and as an infant, but did not develop breast cancer until he was 39 years old. Kris Thomas was exposed throughout his childhood, but did not develop breast cancer until he was 45 years old. If petitioner's arguments are credited, these individuals will have no legal recourse. As recognized by United States District Court Judge Terrence Boyle:

> [T]hose exposed to the water at Camp Lejeune could not have connected their illnesses to the alleged contamination until studies and investigations began revealing such causation in 2007. Thus, to apply the statute of repose in this case would bar all potential claims from the over 500,000 marines and their families affected. Indeed, it would bar the overwhelming majority of claims involving any cancer.

Jones v. United States, 751 F. Supp. 2d 835, 841 (E.D.N.C. 2010).

C. Petitioner's position would absolve polluters of liability if they hide their misconduct and succeed in delaying its discovery.

The arguments of petitioner and the United States are especially disturbing given the government's attempts to cover up its misconduct at

Camp Lejeune. If the government had closed Camp Lejuene's wells when it first learned they were contaminated, Janey Ensminger and Rosanne Warren might be alive today. If the government had been forthcoming as to the scope of the problem leading to well closures, these families may have pursued claims against the government within North Carolina's statutory periods. If the government had promptly notified those who were exposed to the toxic water, countless other families may have been able to reduce the impact of their exposure through preventive care and early treatment.

Instead of being forthright about its mistakes, the military chose another approach: deception and delay. Today, it seeks the fruits of that strategy. Because it successfully prevented military families from learning the truth about Camp Lejeune's contaminated water for so many years, the United States argues that these families should be time-barred from filing any claims against it. While ordinary statutes of limitation can be tolled to account for such misconduct, those with periods of repose are not generally subject to equitable tolling. *See NCUA Bd. v. Nomura Home Equity Loan, Inc.*, 727 F.3d 1246, 1255 (10th Cir. 2013). Should the United States' argument prevail, companies and government bodies responsible for environmental disasters in North Carolina will have every incentive to use the military's strategy here: conceal their misconduct for as long as necessary to invoke periods of repose.

By enacting the FRCD, Congress determined that entities should bear the economic costs caused by their toxic contamination. When the FRCD was used to impose liability on private enterprises, the United States embraced its remedial purpose:

> By increasing the likelihood that persons harmed by hazardous materials will obtain compensation for their injuries, the FRCD provision furthers CERCLA's purpose of "induc[ing]" companies generating, transporting, dumping and storing, etc., hazardous wastes "voluntarily to pursue appropriate environmental response actions with respect to inactive hazardous waste sites." H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. 1, at 17 (1980). As the Study Group Report emphasized, "the economic cost of injury should be carried by the industry or enterprise that creates [it], because efforts to reduce the cost will result in greater care and more safety and protection of the public." Study Group Report 248.

Brief for the United States on Petition for a Writ of Certiorari, *Freier v. Westinghouse Elec. Corp.*, No. 02-1036 (U.S. filed March 12, 2003) (quotation marks and record citations omitted) (discussing the constitutionality of the FRCD). The government's position in *Freier* predated the lawsuits from the Camp Lejeune victims. Faced with the prospect of having to absorb the economic costs of its own misconduct, the government has reversed course. It now contends that states can circumvent the FRCD through statutes of

repose, and that entities can avoid the economic cost of their injuries by hiding their misconduct. The government's current position directly conflicts with the text and purpose of the FRCD.

Camp Lejeune's Marines were willing to give their lives to defend the United States. In return, the United States government recklessly exposed these Marines and their families to poisoned water for decades, and then concealed the facts that could have mitigated the devastating consequences. The government now asks this Court to reward its reckless misconduct and intentional deception by narrowly construing a remedial statute so as to block victims' claims for relief. But the FRCD was designed to ensure that all citizens would be able to pursue claims based on latent diseases caused by exposure to hazardous materials, regardless of the vagaries of state periods of limitation. *Amici* and others similarly situated should not be excluded from CERCLA's protection.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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